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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 725

CASCO PRODUCTS CORPORATION,
Petitioner,

vs.

SINKO TOOL AND MANUFACTURING COMPANY,
Respondent.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DRURY W. COOPER,
HENRY M. HUXLEY,
THOMAS J. BYRNE,
Counsel for Petitioner.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondent appears to have missed the fundamental point of the petition for certiorari.

Of course the decision of the Court of Appeals does not specifically hold that the licensed patents are invalid, but our point is that the effect of the decision in holding (R. 616) that there can be no "infringement" if a licensee's device follows the prior art *plus mechanical skill*, even though the claims of the licensed patent read upon such device, is to "destroy the patent and defeat the grant", which is precisely the thing which this Court in *Westinghouse Company* v. *Formica Company*, 266 U. S. 342, 351, held could *not* be done.

It is the novel "corollary rule" of the Court of Appeals which we submit would be detrimental to the public interest, and which is in conflict with *West* v. *Premier Register Table Co.* (C. C. A. First), 27 Fed. (2d) 653, and contrary to the underlying principle of the *Formica* case.

This Court's decision in the *Formica* case (266 U. S. 342) is discussed on pages 5 and 6 of respondent's brief. In that case Claims 11 and 12 were literally anticipated by the Baekeland patent discussed on page 347 of the decision, except that the Baekeland patent apparently did not specify whether the articles were planiform or non-planiform, but the application for the O'Conor patent there in suit, as well as the prior art, showed the equivalency in this art of planiform and non-planiform articles (p. 346).

Under these circumstances, as pointed out on pages 12 and 13 of petitioner's brief, this Court held that the two-step process was the only new thing over the prior art and therefore construed the claims to include the two-step process.

On page 7 of its brief, respondent states that "Petitioner's Claims, at Face Value, Are Not Infringed", and makes the further statement on page 5 "that even a cursory examination of the claims with the devices charged to be infringed will reveal that, even without reference to the prior art, they do not read on the accused devices."

If these statements were correct, there would have been no occasion for the Court of Appeals to refer to this Court's decision in the *Formica* case or to set forth its "corollary rule" (quoted on page 3 of our petition) to the effect that if a defendant's device followed the prior art, plus mechanical skill, there would not be "infringement" even though the claims read upon the accused device.

We deny the correctness of respondent's statement that the claims of the licensed patents do not read on defendant's accused devices.

One of the accused devices has been specifically discussed. On page 8 respondent states that its device "does not have 'a supporting plate' with 'a dished portion adapted to snugly fit said mica plate'," as provided in the claim quoted on page 17 of petitioner's brief; and respondent further states, "The accused device has a hemispherical cup in which is loosely mounted a curved mica spider."

We need merely call attention to an illustration of this accused device as shown on page 213 of the record. The supporting plate is the plate 31, flat in its central portion, and having a curved and perforated peripheral portion, which thus makes the "dished portion". The mica plate is 21, having a flat central portion and a perforated curved peripheral portion conforming to the dished portion of the plate 31. The mica disk 21 and the supporting plate 31 are held in close engagement with each other by the flanged portion 20a on the pin 20.

It is submitted that the respondent is clearly incorrect in its statement that the accused device does not have "a supporting plate" with "a dished portion adapted to snugly fit said mica plate".

Respondent (page 8) paints an exaggerated picture in its allegation that there are "over seventy-five separate questions of infringement" involved in this case. To be exact, there are five accused constructions and six patents of the license which are involved, and in the Court of Appeals there was no difficulty in illustrating the constructions of the patents, typical claims and respondent's devices on five sheets of drawings.

The double time allowed for argument in the Court of Appeals was on account of the fact that three appeals were considered together. The petition herein relates to only one of the three appeals.

The real question in this case is one of law, and when the correct rule of law is determined, its application to the facts of this case is simple.

It is respectfully urged that the petition should be granted.

Respectfully submitted,

DRURY W. COOPER,
HENRY M. HUXLEY,
THOMAS J. BYRNE,
Counsel for Petitioner.

February 11, 1941.

Receipt of three copies of this Reply to Respondent's Brief is acknowledged this 12 day of February, 1941.

(Sgd) Bernard A. Schroeder
Counsel for Respondent.